PW's AS WAR INALS

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ATTEMPTS to improve the condition of US prisoners of war (PW's) in North Vietnam have been prominent in US diplomatic efforts, but have met with little success. The US position has been the obvious one of insisting upon the treatment guaranteed by the 1949 Geneva Convention on prisoners of war. This convention was designed by the international community to prevent exactly what is taking place in North Vietnam today. It is necessary, then, to examine the reasons the North Vietnamese Government has put forward to justify its apparent misconduct.

Since the beginning of the hostilities, North Vietnam has continually refused to apply the 1949 convention to US prisoners of war on the basis that it considered these prisoners "war criminals." The seed of this attitude apparently lies in a former custom which was interpreted by many to hold that those who violated the laws of war could not avail themselves of the protection such laws afforded. Out of this, the North Vietnamese seem to have reasoned that members of the enemy armed forces who committed "war crimes" could not claim, as a matter of right, the protection and standard of treatment afforded other prisoners of war by international conventions.

Title photo courtesy *Army News Features.*

Actually, such a custom or rule, whose ramifications and limits were never clearly spelled out, no longer exists. A new and more judicious attitude was already evident in Article 63 of the 1929 Geneva Convention which established minimum procedural safeguards for the trials of prisoners of war. The problem in World War II was whether such procedural safeguards applied both to "precapture"—usually war crimes—as well as "postcapture" offenses—usually breaches of camp discipline.

World War II War Crimes

The matter was important in connection with the trial of General Tomoyuki Yamashita for war crimes immediately following World War II. The procedures required by the 1929 Geneva Convention were not followed in the conduct of his trial. The US Supreme Court upheld the conviction interpreting such procedural requirements of the convention to be applicable only to trials for postcapture offenses.[1] A similar conclusion was reached by the Netherlands Court in the Rauter trial[2] and by the French Supreme Court of Appeals in the trial of Robert Wagner.[3]

The drafters of the 1949 convention sought to modify the restrictive World War II interpretation not only by changing the location of the article requiring procedural safeguards (now Article 102), but, more importantly, by adding an entirely new article. This new provision, Article 85, provides that:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present convention.

Reservations to Article 85

Following the adoption of this article, an interesting series of events took place, the unhappy effect of which is with the US prisoners in North Vietnam today.

First, when depositing its ratification to the 1949 Geneva Convention, the Soviet Union made the following reservation, and 11 other Communist countries, including North Vietnam, made reservations which were the same in substance although varying slightly in form:

The (communist state concerned) does not consider itself bound by the obligation which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

Next, several states, upon reading the reservations, considered them unclear in regard to the precise benefits otherwise provided by the convention, which were to be denied prisoners of war by the Communist states, and the precise time such benefits would be withdrawn. Consequently, the Swiss

[1] Re Yamashita, 327 U.S. 1, 20-23 (1946).
[2] 14 LRTWC 116 (1949).
[3] 3 LRTWC 28, 42, 50 (1946).

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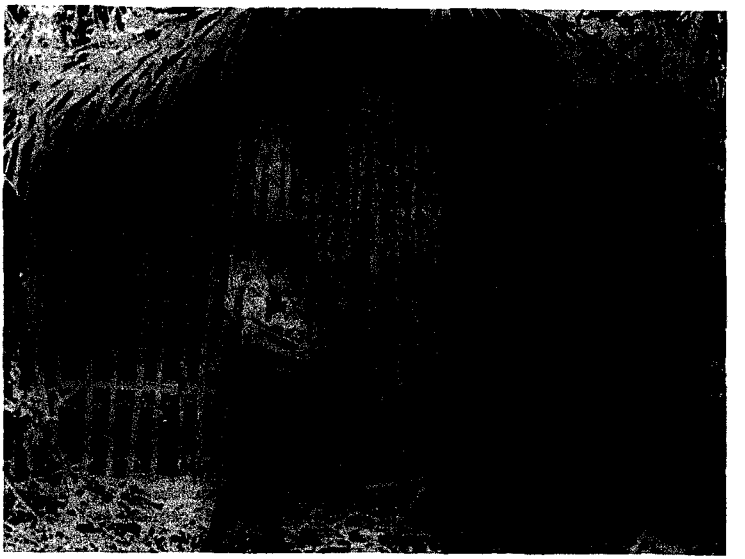

US Army

A cage in a Viet Cong prisoner of war camp where US prisoners were reportedly held

Federal Council, in its capacity as depository of the 1949 convention, was requested to ask the USSR for an interpretation of its reservation. The Swiss Federal Council did so, and, on 26 May 1955, the Soviet Union made the following reply:

. . . the reservation . . . signifies that prisoners of war who . . . have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts. Once sentence has become legally enforceable, *persons in this category consequently do not enjoy the protection which the convention affords.*

With regard to persons sentenced to be deprived of their liberty the protection afforded by the Convention becomes applicable again only after the sentence has been served. . . . *(Emphasis added.)*

It is clear from this reply, as, indeed, it appeared reasonably clear from the wording of the reservation itself, that the USSR and other Communist states did not intend to preserve the customary rule of denying certain prisoner of war rights to a suspected war criminal, but intended only to deprive a prisoner of war rights guaranteed by the convention while serving a sentence for the commission of a war crime or a crime against humanity.

A neutral state or the International Committee of the Red Cross could not look after his interests during the period of incarceration as they could

those prisoners of war convicted of postcapture offenses involving disciplinary breaches and other common law-type crimes committed after capture. The rights lost pertain to the manner of incarceration, inspection by outside agencies, and communication from and to the convicted prisoner.

War Criminal Issue

There is no hint in the reservation itself, in the Soviet explanation, or in the interpretation of the International Committee of the Red Cross [4] that a large group of prisoners could be labeled "war criminals" without trial and thus deprived of all rights under the convention. Such a position does not lend itself to serious consideration. Unfortunately, however, its lack of substance has not prevented the North Vietnamese from putting it forward as supporting justification for the denial of protection.

Ambassador David K. E. Bruce, former chief of the US delegation to the negotiations on Vietnam now taking place in Paris, adequately summarized the war criminal issue in answering a question put to him at a news conference in Paris on 1 December 1970:

Question. *What about the fact that North Viet-Nam doesn't recognize these men as prisoners of war?*

Answer. *Well, they have got them now in a sort of limbo. They used to be 'war criminals.' Now they are labeled variously as 'soldier'—not as 'mercenaries' except in private conversation, sometimes even then they are labeled as 'war criminals'—but I think that they are plainly covered by the Geneva Convention and by the language of it. There is a fine juridical point involved there which I won't bore you with as to whether had they brought these men to trial as war criminals, and had they then been tried and found guilty, whether then they would have been prisoners of war.*

I will refer you to an international lawyer because as an old, but now ignorant, lawyer myself I find the question quite fascinating, and I think that the attitude taken by the other side in this respect is absolutely without any foundation whatever. [5]

Crimes Against Peace

A curious omission from the reservations to Article 85 made by the Communist states is any reference to crimes against peace. The reservation refers only to prisoners of war convicted of war crimes and crimes against humanity. There were, however, at Nuremberg not two, but three categories of crimes—the third being crimes against peace.

A literal reading of the reservation would require that any prisoner of war sentenced for crimes against peace would, even after conviction, remain entitled to all the benefits provided by the convention. However, it is felt that the Communist states probably would not make such a fine distinction and would lump crimes against peace under war crimes, and thus interpret their reservation as all encompassing.

A graver problem than terminology is involved in charging prisoners of war as war criminals because they participated in a war regarded by a captor as illegal. The charge of illegal war, as developed and interpreted at the Nuremberg trials, applies only to

[4] See Pictet Commentary—Geneva Convention Relative to the Treatment of Prisoners of War 425 (1960).

[5] *The Department of State Bulletin*, 21 December 1970, p 741.

those who have held policymaking positions in the initiation or basic direction of the war. Under this interpretation, certain German generals were acquitted of such a charge. [6]

It has been further stated:

Even supposing that the fact of aggression is clearly established, there can therefore be no question of instituting penal proceedings against a large number of prisoners of war or against certain categories of them. If the Detaining Power considered that it had reason to institute such proceedings, that could only be in exceptional cases, against prisoners of war who in their own country had a direct influence on the decisions which led to the launching of the war of aggression. [7]

There is, unfortunately, a real danger that the limited definition of those possibly guilty of crimes against peace will be broadened in an ideological conflict to include captured military officers, as well as individuals in high, political policymaking positions.

Inherent Inequities

This reasoning does not apply to those military prisoners who have violated specific laws of war in the conduct of hostilities or in the treatment of helpless civilians or prisoners of war. For example, in World War II, Japan tried some US airmen as "war criminals," charging them with the willful bombing of what the Japanese authorities considered to be obviously nonmilitary targets. If such charges were factually true, there could be no strict legal objection, then or now, to such trials by a captor.

However, there are several inherent inequities to such trials during the war. The first is the obvious difficulty the accused has in securing evidence in his own behalf. The second is the extreme danger of bias in an enemy court inflamed by the propaganda and hatreds of wartime. The first can be avoided, and the second lessened somewhat by deferring such trials to the end of hostilities.

Crimes Against Humanity

Crimes against humanity are principally war crimes on so vast a scale that they usually require the continued participation of governmental agencies rather than the unplanned delinquencies of individual soldiers. There is, therefore, no real reason why a military man could not be involved in a crime against humanity although it would appear less confusing to look upon the act simply as the war crime it most frequently is. Even a prisoner of war might, after capture, be guilty of a crime against humanity if he permits himself to be a tool in the systematic persecution of other prisoners or of his own countrymen.

The legal protection enjoyed by prisoners of war has been steadily progressing since the United States and Prussia first signed a treaty governing the treatment of prisoners of war. [8] The 1949 Geneva Convention on prisoners of war represents the fruit of 185 years of continuing efforts to improve this humanitarian area of the law of war. It has been seriously compromised by North Vietnam with its "war criminal" classification.

This danger to the convention of war crimes accusations against prisoners of war was noted even before the Vietnam hostilities. In 1960, the International Committee of the Red

[6] U.S. V. Von Leeb, 10 Trials of War Criminals 448 (1950).

[7] Pictet Commentary, *op. cit.*, 421 (1960).

[8] 8 Stat. 84, 96, 1785.

Cross, in its commentary, stated:

During the conflicts which have occurred since the Second World War, there have been a great many accusations of the violations of the laws and customs of war; it is to be feared that accusations of this kind might be brought systematically against a great many members of the armed forces or at least against certain categories of these forces.[9]

[9] Pictet Commentary, *op. cit.*, 425 (1960).

This danger may be minimized by:

- Eliminating the reservations to Article 85.
- Maintaining the limited category of those capable of committing crimes against peace.
- Postponing most war crimes trials by the captor to the end of the hostilities.
- Maintaining prosecution during the conflict by a combatant's own courts of its members guilty of individual war crimes.

As long as Americans are held prisoner in Southeast Asia, as long as Americans missing in action have not been properly accounted for, our efforts must continue to keep this issue before the public in our own country and in the rest of the civilized world and to reinforce the demand for justice for these men.

We must continue unceasingly to demand that the rights of prisoners of war under the Geneva Convention be respected. . . .

Secretary of Defense Melvin R. Laird